Supreme Court U.S.
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No. 01-1500

IN THE

Supreme Court of the United States

Erick Cornell Clay,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

It would be hard to imagine a more obvious cert. grant than this case. The Solicitor General frankly acknowledges (BIO 8) a five-to-two circuit split over whether the time to file a Section 2255 motion runs from the issuance of the court of appeals' mandate on direct appeal or instead from the expiration of the time to seek certiorari. He also admits (at 9) that the minority rule, which the Seventh Circuit applied in this case to dismiss petitioner's motion, is totally wrong on the merits, such that federal prisoners regularly have their Section 2255 motions wrongly dismissed as untimely. Finally, the petition demonstrated, and the Solicitor General notably does not contest, that the question presented is important and frequently recurring: seven circuits have been forced to confront it; the question is often outcome determinative in district court proceedings; and it can arise in many of the *thousands* of Section 2255 motions that are filed every year in even just those circuits that apply the minority rule. The Solicitor General's principal argument in opposing review – that the government believes it will win on remand – has literally nothing to do with the certiorari calculus. This case is a perfect vehicle to decide the question presented, and indeed not even the Solicitor General disputes that the Court would resolve the circuit conflict. The government's opposition to certiorari thus reflects no more than that the Solicitor General's office, although often pressing its own petitions, has determined to argue that not a *single* petition filed against the government this Term merits review in this Court, no matter how clearly certiorari is warranted. See *www.usdoj.gov/osg/briefs/2001/0responses/toc3index.html* (cataloging Solicitor General's oppositions in paid cases).[1]

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[1] For recent examples, see, *e.g.*, the BIOs in *Gisbrecht* v. *Massanari*, *cert. granted*, 122 S. Ct. 612 (2001) (No. 01-131); *Franconia Assocs.* v. *United States*, *cert. granted*, 122 S. Ct. 802 (2002) (No. 01-455); *BE&K Constr. Co.* v. *NLRB*, *cert. granted*, 122 S. Ct. 803 (2002) (No. 01-518); *Eldred* v. *Ashcroft*, *cert. granted*, 122 S. Ct. 1062 (2002) (No. 01-618);

1. There is no need to belabor the square circuit split that the Seventh Circuit recognized (Pet. App. 5a), the petition detailed (at 4), and the Solicitor General acknowledges (at 8). The fact that *seven* circuits have taken entrenched, conflicting positions on the question presented within the past few years establishes beyond peradventure that only this Court can establish the uniform interpretation of Section 2255 which Congress intended. The government's passing suggestion (at 11 n.4) that petitioner should have filed a *pro se* request for rehearing *en banc* is, of course, totally irreconcilable with the Solicitor General's regular practice of seeking review in this Court without taking that step.[2] Rehearing *en banc* is regularly denied when it offers no opportunity to resolve a circuit conflict, as is true in this case where two courts of appeals apply the minority rule. There manifestly is no realistic prospect that the circuits will resolve the entrenched conflict presented by this case because the Fourth Circuit has denied rehearing *en banc* despite the federal government's confession of error (see Pet. 4-5), *four* different panels of the Seventh Circuit composed of a majority of that court's judges have applied the minority rule without objection (*id.* 2, 4 (citing cases)), and the Seventh Circuit stated definitively in this case that it would not "overrule [its] recently-reaffirmed precedent without guidance from the Supreme Court" (Pet. App. 5a).

2. Nor is there any need to belabor that the question presented frequently recurs, for the Solicitor General does not deny that fact. The Petition (at 5-6) collected numerous

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Boeing Co. v. *United States*, *cert. granted*, 2002 U.S. LEXIS 3829 (May 28, 2002) (No. 01-1209); and *Borden Ranch* v. *United States Army Corps of Eng'rs*, *cert. granted*, 2002 U.S. LEXIS 4226 (June 10, 2002) (No. 01-1243).

[2] For just the examples in the past few *months*, see *FCC* v. *NextWave Personal Comms.*, *cert. granted*, 122 S. Ct. 1202 (2002) (No. 01-653); *United States* v. *Cotton*, *cert. granted*, 122 S. Ct. 803 (2002) (No. 01-687); and *Barnhart* v. *Peabody Coal Co.*, *cert. granted*, 122 S. Ct. 918 (2002) (No. 01-705).

appellate and district court cases in which the circuit conflict has been outcome determinative. Because the United States is the respondent in every Section 2255 motion, the Petition explained (at 6 n.2) that the government could not plausibly dispute the recurring nature of the question without identifying for this Court the cases in which it has arisen. The BIO's conspicuous silence on that point is pregnant. There were 1867 Section 2255 motions filed in the Fourth and Seventh Circuits *alone* last year. See 2001 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, tbl. C-3. Plainly, this case far exceeds the threshold of importance required to justify certiorari.

3. There also is no merit to the Solicitor General's argument (at 7-8, 10) that this case presents a "narrow procedural disagreement" unworthy of certiorari because either the majority or minority rule "will generally provide a sufficient opportunity for the filing of a Section 2255 motion." Almost every circuit split can be recharacterized as presenting two options, either of which is workable. The relevant point is that a square conflict on a recurring question of federal law is intolerable, particularly when, as in this case, it is outcome determinative and extinguishes an important right that Congress has seen fit to confer. The government's position is thus belied not only by innumerable cases in which this Court has granted certiorari to resolve a so-called "procedural disagreement,"[3] but also by the Solicitor General's own explanation (at 7-8) that Congress in the AEDPA enacted time-limits on Section 2255 *precisely* in

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[3] For recent examples, see, *e.g.*, *TRW* v. *Andrews*, 534 U.S. 19 (2001) (holding that the FCRA statute of limitations does not incorporate a "discovery" rule, resolving conflict between Ninth and Third, Seventh, Tenth, and Eleventh Circuits); *Duncan* v. *Walker*, 533 U.S. 167 (2001) (holding that AEDPA's statute of limitations is not tolled while a prior federal habeas petition is pending, resolving conflict between Second and Third, Fifth, and Ninth Circuits). See also *infra* at 9 (discussing *Edelman* v. *Lynchburg College*, *cert. granted*, 533 U.S. 928 (2001) (No. 00-1072)).

order to finally establish a single, uniform "time limit on the filing of motions for collateral relief."

The Solicitor General's related argument (at 10) that the conflict is supposedly tolerable because "a federal prisoner can determine the specific timeliness rule governing his collateral attack long before the one-year limitations period begins to run" was fully anticipated by the petition (at 5-6), which the government just ignores because it has no answer. Section 2255 motions are, as in this case, frequently uncounseled and filed by prisoners residing *outside* the jurisdiction in which they must file; it is utterly unrealistic to believe that uneducated prisoners lacking substantial legal resources will see their way clearly through the haze of the conflict. See Pet. 5. That is, no doubt, why the question continues to arise so frequently. The government's reliance (at 10) on the Seventh Circuit's observation that "what matters is establishing *an unequivocal rule* that lets litigants know where they stand" (*United States* v. *Marcello*, 212 F.3d 1005, 1009-10, *cert. denied*, 531 U.S. 878 (2000) (emphasis added)) has it backwards: that is precisely what is missing now under Section 2255, and few areas of the law could benefit more from "a uniform national rule" (contra BIO 10).

In any event, given the overriding interest in the uniform application of federal law, this Court regularly grants certiorari, including in petitions filed by the Solicitor General, notwithstanding the objection that the petitioner's conduct conceivably could be adapted to each circuit's rule. But even if the Solicitor General's position were correct on its own terms, certiorari would nonetheless be warranted to avoid burdensome litigation over the question presented in the four circuits – the First, Second, Sixth, and Eighth – that have not yet taken a position in the conflict, in which more than *2000* Section 2255 motions were filed last year. See 2001 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, tbl. C-3.

4. The Solicitor General's contention (at 10-11) that this Court has previously declined to review the question presented, and that "[t]here is no reason for a different result here," is just wrong. As the government explains (at 8), only "[t]he Fourth and Seventh Circuits have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review." Thus, the decisions of the Fifth and Sixth Circuits cited by the Solicitor General – *Dunlap* v. *United States*, 250 F.3d 1001 (CA6), *cert. denied*, 122 S. Ct. 649 (2001), and *Wiley* v. *United States*, Order (CA5 Mar. 2, 1999), *cert. denied*, 528 U.S. 1006 (1999) – did not raise the question presented here. The only relevant petition is instead No. 99-9743, *Garrott* v. *United States*, in which the Court did *not* deny certiorari but instead vacated and remanded. See Pet. 7 n.3.

The habeas petitioner in *Dunlap* claimed in the lower courts only that his 2255 petition was timely under the equitable tolling doctrine. The Sixth Circuit addressed only that argument (holding "that equitable tolling does apply to the one-year limitation period applicable to habeas petitions" (250 F.3d at 1003)) and thus did not purport to decide the meaning of "final" under Section 2255. As the Solicitor General explained in *Dunlap*, but blithely ignores now: "In the district court, petitioner did not argue that his Section 2255 motion was timely filed within the one-year limitation period. Nor did petitioner raise that argument in the court of appeals." No. 01-6014 BIO 10-11. See also *id.* 11 ("This Court ordinarily does not review claims not properly raised or passed on below."); *id.* 11 n.3 (explaining that Sixth Circuit had not taken a position on the question presented).

In *Wiley*, the Fifth Circuit did not "hold" anything at all, but rather denied a certificate of appealability, and the petitioner (like the petitioner in *Dunlap*) furthermore did not allege on appeal that his conviction became "final" when the time to seek certiorari expired. *Wiley* thus could not, and did not, present this Court with the opportunity to decide the proper construction of "final" under Section 2255. As the

Solicitor General advised the Court in *Wiley*, but once again too conveniently ignores in this case, "[p]etitioner did not argue [below] that his judgment of conviction became final on the date that his petition for certiorari would have been due; indeed, he specifically repudiated any such argument." No. 99-5386 BIO 10. See also *id.* 11 ("In short, petitioner did not squarely raise in the court of appeals the argument that he advances in this petition, and it is questionable whether that court considered the argument when it summarily denied petitioner's application."). In any event, at the time the *Wiley* petition arose, the circuits were split only one-to-one (see *id.* 7); the fact that the conflict is now *five-to-two* (see BIO 8) demonstrates that this Court's intervention is warranted.

5. Nor is there merit to the Solicitor General's final contention (at 7) that "this case would not be an appropriate vehicle for resolving [the] disagreement among the courts of appeals" because the Solicitor General believes that petitioner will lose once the case is remanded by this Court to the Seventh Circuit and thus he supposedly "cannot obtain relief regardless of how the Court might resolve" the question presented. BIO 11. In reality, there is no disagreement *at all* that this case is an "appropriate vehicle" to resolve the circuit conflict over the question presented. The Seventh Circuit addressed *only* that question, which is, in turn, the only issue that this Court would decide on certiorari. What the court of appeals might, or might not, hold on remand with respect to the merits is utterly irrelevant.[4]

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[4] Indeed, the suitability of granting certiorari in a case in this procedural posture was explicitly raised in *United States* v. *Bean*, *cert. granted*, 122 S. Ct. 917 (Jan. 22, 2002) (No. 01-704), in which the government successfully took precisely the opposite position from the one it advances here. In that case, there was a strong argument that the respondent would prevail in the Fifth Circuit even if this Court reversed the court of appeals' judgment and remanded. But, after detailing recent cases in which this Court had granted certiorari notwithstanding that possibility, the Solicitor General explained that "when an issue resolved by a court of appeals warrants review, the existence of a potential

The undisputed fact that this Court would, in fact, resolve the important circuit conflict over the question presented takes on special significance in the context of this case. For two distinct reasons, appropriate vehicles to decide the issue will be few and far between, such that it would be particularly inappropriate to defer review. First, no petition for certiorari will *ever* be filed from the majority of jurisdictions because the federal government concedes the minority view. Second, Section 2255 petitioners generally proceed *pro se* and rarely manage to preserve jurisdictional issues properly through the district court, the court of appeals, and then this Court. The petitioners in *Dunlap* and *Wiley*, *supra*, are perfect examples. So too is the petitioner in *United States* v. *Torres*, 211 F.3d 836 (CA4 2000), who attempted to file his *pro se* petition for certiorari in the Fourth Circuit and thereby missed the statutory deadline for filing in this Court. See Pet. 7-8 & n.3. This Court accordingly should take the opportunity presented by this case to resolve the conflict over the meaning of "final" in Section 2255.

6. Furthermore, the Solicitor General's claim that petitioner has "abandoned" his substantive claims on appeal by briefing the timeliness issue that the court of appeals actually resolved is simply wrong. Put bluntly, that is not for the government to decide and it is most doubtful that the Seventh Circuit agrees. Indeed, the principal argument pressed by the government below was that petitioner "failed to address the Sixth Amendment claim for which the district court had issued the certificate of appealability," but the Seventh Circuit *expressly did not accept* that argument, electing to "not reach the merits of the Sixth Amendment claim." Pet. App. 3a. If the court of appeals actually believed that petitioner had, in fact, abandoned his claim, it would not

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alternative ground relied upon by the district court, but not addressed by the court of appeals, is not a barrier to such review." No. 01-704 Cert. Reply 3.

have hesitated to dismiss his appeal on that ground.[5] And doubts that the Seventh Circuit would find a waiver here are particularly strong given that court's lenient standard for evaluating *pro se* briefs, under which it need only be "able to understand [the party's] argument" from all the papers in the case in order for it to be "saved * * * from being considered waived." *United States* v. *Morris*, 259 F.3d 894, 898-99 (2001) (citing *Smith* v. *Town of Eaton*, 910 F.2d 1469, 1471 (CA7 1990) (holding that *pro se* appellant's brief was adequate because court could "glean, albeit faintly–the basic facts and general lines of argument from the briefs and record"), *cert. denied*, 499 U.S. 962 (1991)); *McCottrell* v. *EEOC*, 726 F.2d 350, 351 (CA7 1984) (declining to dismiss appeal when *pro se* brief, "though woefully inadequate, sets forth a discernible, albeit unsupported, argument")).[6]

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[5] For recent examples, see, *e.g.*, *Smith* v. *Madison County Firemen's Ass'n*, No. 01-2323, 2002 U.S. App. LEXIS 7633 (CA7 Apr. 22, 2002); *Barr-Carr* v. *Kalinowski*, No. 01-1125, 2001 U.S. App. LEXIS 25059 (CA7 Nov. 20, 2001); *Baker* v. *Department of Human Servs. Shapiro Dev. Ctr.*, No. 00-3203, 2001 U.S. App. LEXIS 22470 (CA7 Oct. 12, 2001); *King* v. *A&R Katz Mgmt.*, No. 01-1911, 2001 U.S. App. LEXIS 22492 (CA7 Oct. 12, 2001); *Vann Nelson* v. *City of Chicago*, No. 00-3433, 2001 U.S. App. LEXIS 19076 (CA7 Aug. 17, 2001).

[6] In this case, for example, petitioner *did* expressly assert in his opening appellate brief that he had been deprived of the effective assistance of counsel in violation of the Sixth Amendment. The government's objection was that he had not sufficiently addressed the specific ineffectiveness claim on which he had received a COA, but rather addressed only a claim that was the subject of a proposed amendment to his Section 2255 application, which the district court refused to accept, of course, because it had ruled that even the initial application was untimely. In these circumstances, it is quite likely that the Seventh Circuit would deem petitioner's brief sufficient to preserve his constitutional claim, as evidenced by the fact that it did not accept the argument that petitioner's appeal should be dismissed. And the fact that the district court issued petitioner a COA on his constitutional claim belies the government's remaining argument (at 12) that petitioner's Section 2255 motion raises no serious issue for the district court to consider, an argument that in any event has nothing at all to do with this Court's certiorari determination.

Of particular note, this is not a case in which the court of appeals ever anticipated deciding the question on which the district court granted a certificate of appealability. The district court never addressed the substance of the ineffective assistance of counsel claim on which it issued the certificate but rather dismissed petitioner's Section 2255 motion as untimely. Realistically, the Seventh Circuit would have only addressed the latter issue because it was in no position to resolve the fact-bound questions relating to petitioner's underlying constitutional claim, which petitioner has not yet had any opportunity to develop. Petitioner thus manifestly did comply with Fed. R. App. P. 28, because his brief contained a detailed analysis of his "contentions and reasons for them, with citations to the authorities and parts of the record on which [he] relies" on the timeliness question the Seventh Circuit could, and ultimately did, decide.

7. That the reasons proffered by the Solicitor General for denying certiorari in this case lack substance is ultimately apparent by comparing them with his position in *Edelman* v. *Lynchburg College*, *cert. granted*, 533 U.S. 928 (2001) (No. 00-1072). *Edelman* involved a six-to-two circuit conflict over the validity of a regulation providing that a Title VII charge need not be verified before the statute of limitations expires. Manifestly, that conflict was "tolerable" in the sense that the Solicitor General urges here: Title VII claimants *already* submitted their charges before the statutory deadline; the only question was whether they also had to verify them in advance. Moreover, Title VII charges, unlike Section 2255 motions, almost uniformly are filed in the jurisdiction in which the claimant resides (making it easier for the claimant to determine the correct rule) and frequently are filed by counsel. The respondent in *Edelman* also argued that certiorari should be denied because the claimant's filing in that case did not actually constitute a "charge" for purposes of Title VII. Judge Luttig had concurred on that ground in the court of appeals, but the majority did not reach these issues. The Solicitor General (responding to this Court's invitation to

express the views of the United States) correctly explained that these objections were immaterial: the circuit conflict brought the case squarely within "the traditional considerations governing certiorari," and the conflict was intolerable because "the great majority of discrimination complaints are submitted by individuals who are unlikely to know at the time of submission that the charge must be verified." No. 00-1072 U.S. Cert. Br. 8, 18. Furthermore, "respondent will be able to present on remand its alternate argument" that the petitioner's submission did not qualify as a "charge." *Id.* 20. Indeed, the grounds for granting certiorari were heightened, the Solicitor General explained, because "[t]he court of appeals' decision, moreover, is erroneous." *Id.* 8. For each of the reasons that the Solicitor General articulated in support of certiorari in *Edelman*, so too certiorari should be granted in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

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